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Supreme Court, U.S.
FILED
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NO. 95-69

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

PEG KERNAN, WARDEN,

Petitioner,

v.

THEODORE ANTHONY WESTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REQUEST FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent Theodore Anthony Weston, through counsel, and pursuant to Rule 39, Rules of the Supreme Court of the United States, hereby requests leave to proceed *in forma pauperis* in the above-captioned matter. Contemporaneous with the filing of this motion, Mr. Weston is seeking to file the accompanying Brief in Opposition.

Mr. Weston proceeded *in forma pauperis* in both the district court and Ninth Circuit. Undersigned counsel was appointed pursuant to the Criminal Justice Act in both courts. Undersigned counsel's application for admission to

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the Bar of this Court was submitted several days ago.

Dated: August 8, 1995.

Respectfully submitted,

Bruce Eric Cohen
Attorney for Respondent
THEODORE ANTHONY WESTON

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BRIEF IN OPPOSITION

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THEODORE ANTHONY WESTON

QUESTIONS PRESENTED

1. Was the Ninth Circuit required to address the state's [petitioner's] presumption of correctness claim when the first time the claim was made by the state in this case was in a footnote of the reply brief it filed in the Ninth Circuit?

2. Is whether a defendant consented to a mistrial a mixed question of fact and law just like other questions of waiver, since the principal consideration is not a simple historical fact but whether the defendant was allowed to retain primary control over the course of the proceedings?

3. Even if consent to a mistrial is potentially governed by 28 U.S.C. 2254(d), is a state appellate court's finding of consent entitled to a presumption of correctness when the state court refused defendant's invitation to apply the special federal constitutional principles defining when consent to a mistrial may be inferred (and cited no federal cases in its opinion)?

4. Assuming section 2254(d) is applicable, is a finding that the defendant consented to a mistrial fairly supported by the record when, after the prosecution improperly introduced prejudicial evidence in rebuttal, the defense filed a motion that made clear that if the court was not going to dismiss the case with prejudice the defendant wanted limiting instructions and not a mistrial, and then, when the court declared a mistrial without prejudice, defense counsel objected vociferously, only to be told to "sit down and be quiet"?

5. Did the district court and Ninth Circuit correctly find that no manifest necessity existed for aborting the first trial here, where the prosecution caused the problem, the defendant wanted to proceed with the trial, curative instructions would have mitigated the prejudice, and the trial court did not act to protect the defendant's interests?

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BRIEF IN OPPOSITION

Respondent Theodore Anthony Weston respectfully requests that the petition for writ of certiorari be denied.

STATEMENT OF THE CASE

A. Procedural History

Mr. Weston was charged with kidnapping Audrey Erickson, robbing her, and forcing her to engage in three acts of oral copulation. (CT 1-4.) The first trial ended when the trial judge declared a mistrial -- over Mr. Weston's objection -- after the prosecutor elicited prejudicial testimony from two rebuttal witnesses. (RT 416, 425-441.) The second-trial jury convicted Mr. Weston of one act of oral copulation but was sharply and irreconcilably divided on the kidnapping, robbery, and other copulation charges, all of which were dismissed. (RT 1077-79.)

Mr. Weston's appeal to the California Court of Appeal was unsuccessful, and the California Supreme Court denied review (Pet., Appendices D and C), but the United States District Court for the Northern District of California (Hon. Marilyn Patel) granted Mr. Weston's habeas corpus petition. The court did so on two independent grounds, holding: 1) forcing Mr. Weston to stand trial a second time violated the Double Jeopardy Clause where the trial court had discharged the first-trial jury without either Mr. Weston's consent or manifest necessity; and 2) Mr. Weston was deprived of a fair trial at the second trial by extremely intemperate remarks made by the trial court in the presence of the jury (e.g., twice calling defense counsel a liar (when the misunderstanding at issue was attributable entirely to the court), and agreeing with the prosecutor's totally unwarranted insinuation in closing argument that defense counsel was dishonest and unethical). (App. B.)

The Ninth Circuit affirmed the granting of the habeas petition. The majority agreed that the first-trial mistrial was declared without either Mr. Weston's consent or manifest necessity. The majority did not reach the alternative ground (fair-trial violation) on which the petition had been granted. (App. A; Weston v. Kernan, 50 F.3d 633 (9th Cir.1995).)

Throughout the foregoing appeal and habeas process, Mr. Weston was in prison, serving the 11-year sentence imposed on him in this case. He was released from custody on May 1,

1995, as a result of the affirmance by the Ninth Circuit.[1] Given the "good-time, work-time" credits earned by Mr. Weston, however, the state would have released him on May 21, 1995, even if his federal claims had been rejected.

B. Facts Pertaining to the Mistrial Declaration That Ended the First Trial

In the first trial, when it came time for the prosecution to put on rebuttal evidence, an acquittal was a distinct possibility.

Audrey Erickson testified that Mr. Weston forced his way into her van outside a nightclub in San Francisco (Sergio's), then drove to a field where he robbed and sexually assaulted her. (RT 90-108.) The reliability of her testimony was attacked, however,[2] and the record clearly

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1. The state did not exercise its option to request that the Ninth Circuit stay its mandate while the petition for certiorari was pending. (See Rule 41(b), Fed. R. App. Proc.)

2. There were inconsistencies, for example, in Ms. Erickson's statements regarding the circumstances under which she and Mr. Weston met (compare RT 64-65 with 313), how he allegedly got in the van (compare RT 87-90 with 315), what he allegedly did to her (compare RT 106, 108, 177-86, with 317-18, 388-93), and whether she called the police when she got home (compare RT 194-96 with 325-31, 359-64).

Ms. Erickson's corroborating witnesses, moreover, were Robert Vieira and Sam Sylvester. Whereas Erickson and Vieira claimed to be non-romantically involved friends who rarely frequented Sergio's together (RT 60, 147-49), the bartender later testified that Erickson and Vieira would come into the bar together four to five times a week (RT 588-589) and were physically affectionate on the night of the alleged incident (RT 591, 610). In addition, whereas Erickson and Sylvester indicated they were barely friends who spoke on the phone once a month (RT 243, 253), it later emerged they had been having an extramarital affair and were planning to marry (RT 812-13, 820-21, 857-60).

indicates that at least the second-trial jury did not find her story credible.[3]

Mr. Weston stunned the prosecution, moreover, by calling to the stand an entirely neutral witness -- Donald Montgomery. Mr. Montgomery -- an electronics technician at Sears (RT 334, 554) who had never seen either Mr. Weston or Ms. Erickson before (RT 335, 352) -- thoroughly impeached Ms. Erickson. Mr. Montgomery, on leaving Sergio's, observed the public events that culminated in Mr. Weston and Ms. Erickson leaving the area together. Contrary to Ms. Erickson's claims, Mr. Montgomery testified that Ms. Erickson was very intoxicated, was flattered by Mr. Weston's attentions, allowed him to kiss her several times, and ultimately chose to send her original date home so she could be with Mr. Weston. Furthermore, Montgomery said, Ms. Erickson gave Mr. Weston the keys to her van. Montgomery stayed with them for a few minutes, he said, until he could see "they were getting along fine" and he "felt like [he] was somewhat in the way." (RT 338-43.)

In addition, Mr. Weston presented the testimony of two women who were in the apartment that Mr. Weston brought Ms. Erickson back to. They confirmed that Ms. Erickson happily

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3. The verdict rendered in the second trial makes this clear. Thus, whereas Ms. Erickson testified that Mr. Weston kidnapped her, robbed her, and forced her to submit to three sexual acts, the jury did not find the kidnapping charge to be true, did not find the robbery charge to be true, and returned a guilty verdict on only one of the three sexual offenses charged. (CT 352, 361, 403-06; RT 1077-79.)

disappeared into Mr. Weston's bedroom, where, the indications were, the pair engaged in consensual sex. The witnesses also testified that, after the pair emerged from the bedroom, Ms. Erickson give Mr. Weston money (apparently for drugs), then waited for him to return. When he did not return she became angry and left, believing respondent and the women had conspired to take her money. (RT 265-70, 376.)[4]

In light of the strong defense presented, when the prosecutor announced his rebuttal witnesses (two police officers and Mr. Weston's parole officer) Mr. Weston's trial counsel objected, fearing that the prosecutor, in a desperate effort to avoid an acquittal, would use the witnesses as a pretext for eliciting inadmissible evidence. The trial judge agreed that one of the proposed witnesses could not be called but contemptuously rejected counsel's objections to the other two witnesses. (RT 401-404.) The prosecutor then proceeded to elicit testimony from both witnesses that the trial court itself later acknowledged was prejudicial and plainly inadmissible. (RT 416, 421-423.)[5]

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4. Mr. Weston's defense was that Ms. Erickson willingly accompanied him to the apartment where he was staying and willingly had sex with him. Because he absconded with her money, however, and because her late evening with him undoubtedly created great difficulties for her with at least one if not two of her lovers, she had great incentive to make up the story she told the jury. (See RT 1042-47.)

5. From the first witness, the prosecutor elicited that Mr. Weston had once been arrested for check fraud. ["The Prosecutor: 'Did you place Mr. Weston under arrest?'

(fn. continued on p. 6)

When the first inadmissible testimony was elicited, the trial judge's immediate response was that the prosecutor had deliberately "transgress[ed] this court's order" to confine the witness' testimony to "one [legitimate and narrow] purpose and one purpose alone...." Defense counsel moved for a mistrial. This was in the presence of the jury, however, and counsel did not elaborate on the nature of the mistrial he was seeking. The motion was taken under submission. (RT 416.)

Immediately after prejudicial testimony was elicited from the second witness, however, defense counsel moved the court -- out of the presence of the jury -- to declare a mistrial sua sponte, i.e., with prejudice, on the ground that the prosecutor had deliberately injected error into the trial. (RT 425, 426.)

This angered the trial judge, who insisted (incorrectly) that there was no legal basis for such a motion. (RT 426.) Believing trial counsel was trying to "trick" him into granting a mistrial that would preclude retrial, the judge asserted (quite inaccurately and contrary to his reaction moments before) that the testimony regarding Mr. Weston's arrest for check fraud had been "blurted out" and was not elicited by the prosecutor. (RT 416, 425, 427.)

The day's session ended with this exchange:

Witness: 'Yes, I did.' The Prosecutor: 'For what?' Witness: 'For ... check fraud.'"] (RT 416.)
From the second witness, the prosecutor elicited that Mr. Weston had previously been on parole. (RT 421-23.)

> Court: In forty years I never heard of it [a mistrial with prejudice] but there is a lot of stuff I never heard of in my lifetime. All right, anyway you made a motion for mistrial, am I correct?
>
> Defense counsel: Yes.

(RT 426.)

The next morning, defense counsel filed a written motion making clear that there was authority from this Court for his position that the intentional introduction of inadmissible prejudicial evidence by a prosecutor can justify a dismissal with prejudice. (CT 131, citing, *inter alia*, Oregon v. Kennedy, 456 U.S. 667, 679 (1982).)[6]

The motion also made very clear that Mr. Weston was only interested in a mistrial that would have precluded a second trial on double jeopardy grounds.[7] In the event a mistrial with prejudice was denied, the motion continued, Mr. Weston did not seek to have the jury discharged but

6. The motion was entitled "Defense Motion for Mistrial Based on Prosecutorial Misconduct." (CT 127-136. See RT 429.) The motion requested "that the trial court declare a mistrial in the above matter on the grounds that the prosecutor, ... by his misconduct, goaded the defense into seeking the instant motion for mistrial." (CT 127; emph. added.) The argument portion of the motion began:

> Defendant contends that the prosecutorial misconduct described above mandates a mistrial in this case, and the double jeopardy clause of the Fifth Amendment to the United States Constitution bars any retrial.

(CT 130; emph. added.)

7. It might have been more accurate for counsel to use the term "dismissal," but, as this Court held in Lee v. U.S., 432 U.S. 23, 30 (1977), the point here "does not turn on ... [which] label" -- "'dismissal' or a 'declaration of mistrial'" -- could have been placed on the relief sought.

sought only to have the jury admonished to disregard the prejudicial evidence. (CT 127-132.) Throughout the ensuing argument, defense counsel never abandoned this position. (RT 434-436.)

The trial court rejected the allegation that the prosecutor had deliberately goaded defense counsel into making the mistrial motion. The court again accused defense counsel of trying to trick the court and slander the prosecutor. The court even claimed that it was defense counsel's fault that the prejudicial evidence had come in. (RT 437-438.)

Nonetheless, and wholly unexpectedly, the court granted a mistrial without prejudice (taking all of the credit for recognizing the prejudicial impact of the evidence defense counsel had futilely attempted to persuade the court to keep out). (RT 438-439.)

Immediately and unequivocally, defense counsel protested the court's ruling, stating that, in light of the court's denial of Mr. Weston's motion for dismissal with prejudice, he needed a few minutes to confer with Mr. Weston in order to determine whether Mr. Weston wanted to continue with the first trial or consent to a second. (RT 439.)

The jury was not present during this colloquy and had no idea what was transpiring. The trial judge, who could not have helped but recognize that Mr. Weston was not consenting to a discharge of the jury without prejudice, had

ample opportunity to refrain from ordering that discharge and to permit counsel and Mr. Weston to confer. (RT 439.)

Instead, the trial judge immediately had the jury brought into the courtroom, told defense counsel to "sit down and be quiet" when counsel again objected to the unilateral action the court was about to take, and discharged the jury. (RT 439-441.)

At the second trial, the prosecutor proceeded to take full advantage of his newly-gained opportunity to obtain a conviction in this case.[8]

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8. Whereas in the first trial the prosecution's case-in-chief consisted of the testimony of 4 witnesses and spanned 211 pages (RT 43-253), in the second trial it consisted of the testimony of 7 witnesses and spanned 368 pages (RT 478-845).

Two of the prosecution's second-trial witnesses, furthermore, Lt. Tognetti and Donald Montgomery, were witnesses the defense had called in the first trial (RT 325, 333) and one of them -- Mr. Montgomery, was by far the best witness the defense had. In closing argument in the second trial, moreover, the prosecutor further exploited this theft by arguing the jury should discount Montgomery's testimony because he was not testifying because "he wants to see justice done" but only "because he got a subpoena ...." (RT 1066.)

The mistrial also provided the prosecution with the incentive to interview Glenn Arthur, who testified in the second trial but not in the first. (See RT 612.) Arthur's importance to the case can be measured by the fact that it was his testimony, along with Montgomery's, that the jury wanted to rehear during its deliberations. (RT 1073-1074.) Investigation between the two trials, furthermore, yielded additional evidence that the prosecution had not presented at the first trial. (RT 457, 837-839.)

SUMMARY OF ARGUMENT

The state[9] raises no issue worthy of this Court's concern.

The state claims that the California Court of Appeal's finding that Mr. Weston consented to the mistrial was entitled to a presumption of correctness under 28 U.S.C. section 2254(d). The first time the state made the latter claim, however, was in a footnote in its reply brief in the Ninth Circuit. That is why there is no discussion of the issue in either the district court's or Ninth Circuit's opinion.

Even if the state had presented the claim in some cognizable manner in the courts below, moreover, it would and should have been rejected. First, whether a defendant consented to a mistrial is more than a question of historical fact. It involves more subtle considerations, as whether the trial court allowed the defendant primary control over whether to abort or continue with the first trial. Like all waiver questions, consent to a mistrial is thus a mixed question of fact and law and is not governed by section 2254(d).

Second, even if consent to a mistrial is a finding potentially governed by section 2254(d), the particular finding by the California Court of Appeal does not fall within the statute because the latter court did not even

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9. Petitioner will often be referred to in this brief as "the state."

purport to apply the federal constitutional principles that define such consent.

Finally, the state consent finding is not entitled to a presumption of correctness because the record plainly shows that Mr. Weston did not consent to the declaration of a mistrial without prejudice. This was the unqualified conclusion of both the district court and Ninth Circuit.

The state's second claim is that the district court and Ninth Circuit -- in finding that no manifest necessity justified the mistrial order -- failed to show sufficient deference to the trial court. The state reaches that conclusion, however, by ignoring the considerations that go into the manifest-necessity analysis when it is the prosecution that has improperly introduced prejudicial evidence: e.g., whether the defendant's interest in retaining "primary control over the course to be followed" was honored, whether limiting instructions would have mitigated the harm, and whether the decision to abort was made for the defendant's benefit. Applying the analysis mandated by this Court, the conclusion reached by the district court and Ninth Circuit is the only possible one.

REASONS FOR DENYING THE WRIT

I.

THE STATE DID NOT TIMELY ASK EITHER THE NINTH CIRCUIT OR THE DISTRICT COURT TO ACCORD A SECTION 2254(d) PRESUMPTION OF CORRECTNESS TO THE STATE COURT FINDING ON CONSENT; EVEN IF THE STATE HAD MADE SUCH A TIMELY REQUEST, NEITHER COURT WOULD OR SHOULD HAVE DEEMED THE PRESUMPTION TO APPLY

When, through no fault of the defendant, prejudicial evidence is erroneously presented to the jury, the defendant is forced to choose between two constitutional rights. On the one hand, the Double Jeopardy Clause establishes his right to have his guilt or innocence determined by the first jury to hear his case. (Arizona v. Washington, 434 U.S. 497, 503 (1978).)[10] At the same time, he is entitled to a fair trial. (See generally, In re Murchison, 349 U.S. 133, 136 (1955).) The latter choice, this Court has recognized, is a "Hobson's choice": the defendant must choose "between giving up his first jury and continuing with a trial tainted by prejudicial or prosecutorial error." (U.S. v. Dinitz, 424 U.S. 600, 609 (1976).)

Either option might appear advantageous to a defendant in a given case.[11] Except in a rare category of case,

10. The prohibition against placing a defendant "twice ... in jeopardy" is based on the recognition that a second trial may be "grossly unfair." It not only prolongs a defendant's ordeal but, by allowing "subtle changes in the State testimony" on retrial, "may enhance the risk that an innocent defendant may be convicted." (Arizona v. Washington, supra, 434 U.S. at 503-504, fn. 15.)

11. Despite the admission of prejudicial evidence, a rational defendant could choose "to conclude his confrontation with society through the verdict of [the first] tribunal [if] he ... believe[d it still] to be

(fn. continued on p. 13)

therefore, the Constitution does not dictate which of the above choices is to be exercised.[12] Rather,

> Where prosecutorial error ... of a degree sufficient to warrant a mistrial has occurred, 'the important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error.'

(Oregon v. Kennedy, supra, 456 U.S. at 676, quoting U.S. v. Dinitz, supra 424 U.S. at 600, 609; emph. added.) The defendant's right of primary control is "[c]entral among the protections afforded by the double jeopardy clause ...." (U.S. v. Bates, 917 F.2d 388, 393 (9th Cir.1990).)

Despite the centrality of the defendant's right of primary control in the jurisprudence of this Court, the state does not refer to it in its petition for certiorari. Indeed, despite the fact that the "primary control" principle occupied center stage in the district court's opinion (Pet., App. B, p. 62, 72), the Ninth Circuit's opinion (Pet., App. A., pp. 35-37; 50 F.3d at 637, 638), and

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favorably disposed to his fate." (Arizona v. Washington, supra, 434 U.S. at 514 quoting U.S. v. Jorn, 400 U.S. 470, 486 (1971).) Conversely, a defendant could "reasonably conclude that a continuation of the tainted proceeding would result in a conviction followed by a lengthy appeal and, if a reversal is secured, by a second prosecution. In such circumstances, a defendant's mistrial request has objectives not unlike the interests served by the Double Jeopardy Clause - the avoidance of the anxiety, expense, and delay occasioned by multiple prosecutions." (U.S. v. Dinitz, supra, 424 U.S. at 608.)

12. The only exception is where an error is committed that is certain to result in reversal. As observed by the Ninth Circuit, the state has conceded that the evidence at issue in this case does not fall into that category. (50 F.3d at 638.)

all six briefs filed by Mr. Weston in these proceedings (state and federal), the state has never referred to it in any of the pleadings it has filed in the case.[13]

The reason is self-evident: the principle was flagrantly violated here and the state has no substantive defense to offer.

Instead, the state attempts a procedural end run. The state claims that what this case is really about is whether the finding of the California Court of Appeal -- that Mr. Weston consented to a mistrial without prejudice -- is entitled to a presumption of correctness under 28 U.S.C. sec. 2254(d).

The claim is not worthy of the Court's attention.

First, the claim that the California Court of Appeal's holding that Mr. Weston consented to a mistrial was a finding of fact entitled to a presumption of correctness was not made by the state in the district court. Nor was it made by the state in its opening brief in the Ninth Circuit. The state did not make the claim until its reply brief in the court below -- and even then only made it in a footnote (Reply Br., p. 5, fn. 2) -- leaving Mr. Weston no opportunity or incentive to brief the issue at that time. Under these circumstances, the Ninth Circuit clearly had the discretion to ignore the belated claim. (Int'l Union of

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13. The California Court of Appeal likewise failed to refer to the "primary control" principle in its opinion. (Pet., App. D, pp. 91-96.)

Bricklayers v. Martin Jaska, Inc., 752 F.2d 1401, 1404 (9th Cir. 1985) ["we will not ordinarily consider matters on appeal not specifically and distinctly raised and argued in appellant's opening brief"]. Cf., Bland v. California Department of Corrections, 20 F.3d 1469, 1474 (9th Cir.1994) [in habeas proceeding, California precluded from making an argument in Ninth Circuit that it had not previously made].[14] See also, Burden v. Zant, 498 U.S. 433, 437 (1991) [implicitly accepting premise that party's failure to seek benefit of sec. 2254(d) in lower court would waive right to seek application of presumption in higher court]..)

The fact that the Ninth Circuit did not address the presumption issue in its opinion, therefore, is attributable to the state, not the court, and in no way presents a question that should concern this Court.

In any event, the state's threshold substantive claim -- that a finding of consent to a mistrial is a factual finding within the meaning of sec. 2254(d) -- is wrong.[15]

14. The fact that neither the majority nor the dissent in this case referred to the presumption is further evidence that the state failed to raise the claim in any cognizable fashion. (50 F.3d at 636-42.)

15. The state's claim that, in the Ninth Circuit, Mr. Weston conceded that a finding of consent to a mistrial is a factual finding within the meaning of sec. 2254(d) is not accurate. As indicated above, the state, in its opening brief, made no claim that consent-to-a-mistrial falls within section 2254(d). In his appellee's brief, therefore, there was no argument on the subject for Mr. Weston to concede to.

In one sentence of one footnote, rather, when discussing the district court's finding that consent to the mistrial was not given, Mr. Weston said he "presum[ed]" the finding should be judged under the "clearly erroneous"

(fn. continued on p. 16)

Not all findings of fact fall within sec. 2254(d). Findings are governed by the statute only if they involve "what are termed basic, primary, or historical facts: facts in the sense of a recital of external events and the credibility of their narrators.... So-called mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations, are not facts in this sense." (Townsend v. Sain, 372 U.S. 293, 309, fn. 6 (1963). Whether a defendant has consented to a mistrial is a mixed question of fact and law as defined by this Court.

United States ex rel Ross v. Franzen, 668 F.2d 933 (7th Cir.1982), illustrates the principle. In Ross, the Court of Appeals recognized that what counsel had done (i.e., walk out of a deposition) was a matter of historical fact and the state court's finding on that score was subject to the presumption of correctness. The state court's conclusion that counsel's conduct was "in effect ... a stipulation" that defendant was waiving his right of confrontation, however, "represented ... the application of legal standards

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standard. (Br. of Pet./Aee., p. 13, fn. 10.) He took no definitive position, however, and went on to argue that the finding was correct when the record was reviewed *de novo*. (Id. at 13-17.) Mr. Weston further stated (in another footnote) that, since the consent finding of the California Court of Appeal was "utterly without support in the record," *de novo* review of that finding would quickly show it was not entitled to a presumption of correctness. (Id. at p. 17, fn. 16.)

Thus, while Mr. Weston may have assumed arguendo the potential applicability of section 2254(d), he did not purport to (and was not called on to) address that threshold question on the merits. He does so for the first time here.

... to the historical facts" and was not governed by section 2254(d). (668 F.2d at 938. See also Brewer v. Williams, 430 U.S. 387, 395-97, 402-04 (1977) ["the question of waiver" is "not a question of historical fact" within the meaning of section 2254(d) but "requires application of constitutional principles to the facts as found"]; Cuyler v. Sullivan, 446 U.S. 335, 342 (1980) [findings regarding the roles counsel played in the defenses of the various co-defendants are findings of fact within the meaning of section 2254(d); whether the conduct amounts to multiple representation, however, is "a mixed determination of law and fact" and is determined *de novo*].)

The same analysis applies here. What an attorney says and does before and after the granting of a mistrial are historical facts subject to the statute. Whether those statements and conduct permit an inference of consent to a mistrial (i.e., a waiver of the defendant's constitutional right to proceed to judgment -- Arizona v. Washington, 434 U.S. at 503), however, is governed by principles of federal constitutional law that define both what consent is and when a court may infer that it was given.

As the Ninth Circuit correctly observed below, the issue of consent is inseverable from the overriding issue of whether the defendant was permitted to "retain primary control over the course to be followed." (50 F.3d at 637, quoting United States v. Dinitz, supra, 424 U.S. at 609. See Rogers v. Richmond, 365 U.S. 534, 547 (1961) ["(S)o-

called facts and their constitutional significance may be so blended that they cannot be severed in consideration"]). Because consent to a mistrial constitutes a waiver of a federal constitutional right, moreover, federal law precludes a court from inferring consent unless "the circumstances positively indicate a defendant's willingness to acquiesce in the mistrial order." (Glover v. McMackin, 950 F.2d 1236, 1240 (6th Cir. 1991).)

A finding of consent to a mistrial, therefore, is not merely a historical determination subject to sec. 2254(d). It is, rather, a conclusion shaped and governed by federal constitutional legal principles and is thus "a question of federal law which ... must [be] review[ed] *de novo*." (Schiro v. Farley, _ U.S. _, _, 114 S.Ct. 783, 790-91 (1994).[16])[17]

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16. In Schiro, this Court indicated that the finding of "[t]he Indiana Supreme Court ... that the jury verdict did not amount to an acquittal on the intentional murder count" would ordinarily be considered a finding of fact. The Court held that sec. 2254(d) was inapplicable, however, because "the preclusive effect of the jury's verdict ... is a question of federal law which ... must [be] review[ed] *de novo*." (114 S.Ct. at 790-91 (1994).)

17. The state claims that Schneckloth v. Bustamonte, 412 U.S. 218 (1972), is relevant here. (Pet., p. 19.) It is not.

The issue in Schneckloth was whether a state can show a defendant's consent to search was voluntary even if it cannot show the defendant knew he could refuse to permit a search. In answering the question affirmatively, the Court stated that the "voluntariness [of a consent to search] is a question of fact to be determined from all the circumstances...." (412 U.S. at 249.)

The latter conclusion does not shed light on the section 2254 question posed here, however. This is made clear by the fact that this Court has held that, while the

(fn. continued on p. 19)

Even if consent to a mistrial is, as a general matter, deemed a factual question potentially subject to section 2254(d), moreover, the statute cannot be applied to the particular finding made by the California Court of Appeal. That is because the California Court of Appeal -- despite being asked to do so in Mr. Weston's opening brief, reply brief, and petition for rehearing, and at oral argument -- did not apply any federal constitutional principles to the question of consent, including the central requirement that the defendant be allowed to retain "primary control over the course to follow." (See Pet., Exh. D, pp. 91-96.)[18]

Thus, if the state had raised the presumption of correctness issue in timely fashion, the Ninth Circuit could, should, and would have responded, as it did in Norris v. Risley, 878 F.2d 1178 (9th Cir.1989): "Because the [California Court of Appeal] failed to apply the correct legal standard, there is no state court judgment to which we can give deference." (Id. at 1181. Accord, Rogers v. Richmond, 365 U.S. 534, 547 (1961) ["Historical facts 'found' in the perspective framed by an erroneous legal standard cannot plausibly be expected to furnish the basis for correct conclusions...."]; Lafferty v. Cook, 949 F.2d

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voluntariness of a confession is also judged by the totality of circumstances, such a finding is not subject to 2254(d). (See, e.g., Withrow v. Williams, _ U.S. _, 113 S.Ct. 1745, 1754 (1993).)

18. Chief Judge Wallace also fails to deal with the "primary control" requirement in his dissenting opinion. (50 F.3d at 639-42.)

1546, 1550-1556 (10th Cir.1991), cert. denied, 112 S.Ct. 1942 (1992) ["Although competence is a factual issue ..., the state court's finding of competency cannot stand given the court's failure to proceed under a proper understanding of the due process requirements"].) Since the state court never made a finding of consent as defined by federal law, there was and is no finding that falls within the domain section 2254(d).

If the state had timely raised the presumption issue, furthermore, and if the California Court of Appeal had relied on federal constitutional principles in finding consent, then the Ninth Circuit would have been obligated to address on the merits the applicability of section 2254(d). (Burden v. Zant, supra, 498 U.S. at 437.)

That would have changed nothing, however. It is abundantly clear that both the district court and the Ninth Circuit believed that the state court's conclusion that Mr. Weston consented either was "not fairly supported by the evidence" or had been shown "by convincing evidence" to be "erroneous." (Sec. 2254(d)(8). See Parker v. Dugger, 498 U.S. 308, 320 (1991) [holding a finding of the "Florida Supreme Court ... not fairly supported by the record"].))

Thus the Ninth Circuit held: "[D]efense counsel's immediate and repeated objections demonstrate that Weston did not consent to the mistrial.... Quite the contrary, Weston's counsel strenuously objected to the mistrial. The state trial court's declaration of a mistrial over these

objections deprived Weston of his right to retain primary control over the course of the proceedings." (50 F.3d at 637-38; Pet., App. A, pp. 36-37.)

Similarly, the district court held: "It is clear from the record that Mr. Weston did not consent to the trial judge declaring a mistrial without prejudice -- defense counsel actively sought to persuade the judge that such a mistrial was not what he wanted.... [H]is subsequent written motion certainly clarified that intent, and he made numerous attempts to persuade the judge not to declare the mistrial without prejudice. These circumstances make clear that Mr. Weston did not consent to the mistrial without prejudice." (Pet., App. B, pp. 64-66; emph. in orig.)

If the district court and Ninth Circuit had been presented with the need to explicitly address the presumption of correctness issue, therefore, the net result would have been the same. Each court would have concluded that Mr. Weston did not consent to a mistrial and that the contrary conclusion of the California Court of Appeal was inconsistent with the plain facts.

The latter conclusion, finally, is unassailable on the merits.

In the immediate aftermath of the prosecutor eliciting that petitioner had been arrested for check fraud, Mr. Adachi did not state what kind of mistrial he was seeking. (RT 416.) As soon as counsel could argue out of the presence of the jury, however, he made it clear he was not

requesting a mistrial without prejudice.[19] He stated explicitly, in both his written motion and oral argument, that what he was seeking was a mistrial declared by the court sua sponte, a mistrial with prejudice, an order that, by virtue of "the Double Jeopardy Clause," would "end all prosecution of the defendant for the offense charged .... (Lee v. U.S., supra, 432 U.S. at 30. See CT 127, 130, 132; RT 424, 426, 434-435.) Each time the court attempted to have counsel discuss his motion as an ordinary motion for a mistrial without prejudice, counsel stuck to his position that prosecutorial misconduct can support a dismissal with prejudice. (See, e.g., RT 425-426.)

All the state can do is point to a single exchange. After the trial judge asserted that "in forty years" he had "never heard of" a court granting a mistrial with prejudice, he asked: "All right, anyway you made a motion for mistrial, am I correct?" Counsel answered "yes." (RT 426.)

The "yes" spoken by trial counsel did not come anywhere close to "positive[ly] indicat[ing] consent" to a mistrial without prejudice. (Glover v. McMackin, supra, 950 F.2d at 1240.) The exchange reflected a disagreement as to the law. Whereas the trial court insisted that there was no such thing as a mistrial with prejudice based on deliberate

19. Even if counsel's request for a mistrial at RT 416 was a request for a mistrial without prejudice, he was allowed to "reassess" his position. There is "no reason to lock [a] defendant into a motion once it is made." (Lovinger v. Circuit Court, 845 F.2d 739, 744 (7th Cir.1988).)

prosecutorial misconduct (RT 426), defense counsel knew there was. (See Oregon v. Kennedy, supra, 456 U.S. at 679.) The fact that defense counsel told the court he was asking for a mistrial, consequently, did not mean he was asking for one on the court's terms. Indeed, following counsel's "yes," the court proceeded to question the prosecutor regarding his motivation in eliciting the inadmissible and prejudicial rebuttal testimony. (RT 427-428.) From defense counsel's perspective, the latter questioning was perfectly relevant to petitioner's motion for mistrial with prejudice.

To the extent there was any ambiguity, furthermore, it was removed by the written motion Mr. Weston filed the next morning. That motion made clear that Mr. Weston's first choice was a mistrial with prejudice. The motion made clear, moreover, that a mistrial without prejudice was not petitioner's second choice. He made very clear that his second choice was to continue with the first trial and to have the court admonish the jury regarding the inadmissible evidence the prosecutor had elicited. (CT 132.) The court had the motion in hand before ruling. (RT 429.)

Indeed, the court entertained further argument after receiving the written motion. Everything stated by defense counsel during the hearing was directed at showing the prosecutor's misconduct was designed to induce a mistrial. (RT 434-436.) Rather than "positive[ly] indicat[ing] ... defendant's willingness to" consent to a mistrial without prejudice, counsel's argument was one hundred percent

consistent with his written motion and his argument the day before.

Finally, even if, at the moment the trial court purported to "grant" Mr. Weston's motion, the court truly believed Mr. Weston was consenting to a mistrial without prejudice, such a belief would have been dispelled by counsel's response immediately thereafter. Counsel not only made clear that Mr. Weston's motion was based solely on prosecutorial misconduct -- counsel also requested the opportunity to talk with Mr. Weston before the court discharged the jury. (RT 439-440.) The court cut counsel off before he could elaborate, but counsel's intent was clear: he wanted to ask Mr. Weston whether he wished to consent to a mistrial without prejudice. (CT 134-136.)[20]

Numerous cases have held that consent to mistrial will not be inferred where the defendant was not given the opportunity to object.[21] In this case, despite the court's

20. The declarations that were later filed by Mr. Weston and his attorney (CT 134-136) only confirmed the obvious.

21. See U.S. v. Jorn, supra, 400 U.S. at 487 ["the trial judge acted so abruptly in discharging the jury that had the [defendant] been disposed ... to object to the discharge of the jury, there would have been no opportunity to do so"]; U.S. v. Bates, supra, 917 F.2d at 393 ["Because [defendants] had no opportunity to object, we will not infer that they consented to the mistrial"]; Lovinger v. Circuit Court, 845 F.2d 739, 744, 745 (7th Cir.1988) [no "implied consent" where "no opportunity to object;" failure "to allow [defendant] to express his view on the propriety of mistrial ... deprived [him] of the opportunity to exercise any control over the fate of the trial"]; Hutson v. Superior Court, 203 Cal.App.2d 687, 693 (1962) ["with such an important right involved the defendant personally should have been given an opportunity to consent ... or specifically to refuse"].

(fn. continued on p. 25)

effort to silence his attorney, petitioner did object and he did so as soon as the court's intent was declared and prior to the jury being discharged. If lack of opportunity to object is not consent, a fortiori, defendant's actual objection is irreconcilable with a finding of consent. The objection plainly did not amount to a "positive ... indicat[ion of] ... defendant's willingness to acquiesce in the mistrial order." (Glover v. McMackin, supra, 950 F.2d at 1240. Accord, People v. Catten, 508 N.E.2d 920, 923-924, 926-927 (N.Y.1987).)[22]

The California Court of Appeal, in its discussion of the consent issue, made no effort to explain how defense counsel's vociferous objection when the mistrial announcement was made was in any way consistent with a finding of consent. (App. D, pp. 95-96.)

Also see State v. Flick, 495 A.2d 339, 344-346 (Me.1985) [court initially denied defendant's motion for mistrial without prejudice, then later granted it without asking defendant if he still wished to abort the proceedings; held: no consent, retrial barred]. Accord, Braxton v. U.S., 395 A.2d 759, 767-773 (D.C.App.1978).

In California, the law is that consent will not be inferred from a defendant's silence even where he was given an opportunity to object and remain silent. (See Compton v. Superior Court, 6 Cal.3d 55, 63 (1971); People v. Chaney, 202 Cal.App.3d 1109, 1117 (1988).)

22. In Catten, the court initially denied co-appellant Murphy's mistrial motion. Subsequently, without consulting Murphy, the court granted the motion. Defense counsel objected. Circumstances had changed and he wished to discuss the matter with Murphy. The court rebuffed him. Held: no consent could be implied under these circumstances. (Ibid.)

The situation here was very much like that People v. Squires, 300 N.W.2d 366, 367 (Mich.App.1981). In Squires, defense counsel moved midtrial for dismissal with prejudice based on alleged prosecutorial misconduct. The trial court rejected the motion but granted a mistrial without prejudice. The appellate court found retrial barred by double jeopardy:

> Clearly, the defendant here did not consent to a mistrial. Rather, he sought a permanent termination of the criminal proceedings via his self-styled motion for dismissal with prejudice.

(300 N.W. 2d at 367.)

That conclusion is perfectly apposite here. The conclusion of both the district court and the Ninth Circuit that Mr. Weston did not consent to a mistrial without prejudice is supported by overwhelming evidence. There is no reason whatsoever for this Court to disturb the indisputably correct conclusions reached by the courts below.

II.

The Conclusion of the District Court and Ninth Circuit That Manifest Necessity Did Not Justify The Mistrial Here Was Consistent With -- Indeed Was Dictated By -- This Court's Holdings

The state claims the Ninth Circuit failed to afford the trial court's conclusion that a mistrial was necessary the degree of respect required by Arizona v. Washington, supra, 434 U.S. at 510. The claim has no merit.

The respect principle (which the Ninth Circuit was cognizant of -- 50 F.3d at 638, fn. 3.) is but one part of the analysis. This Court has also said that the power to declare a mistrial and to force a defendant to stand trial again is one that may be exercised "only in very extraordinary and striking circumstances." (U.S. v. Jorn, supra, 400 U.S. at 485.)[23] The state ignores the latter principle. It also ignores the concomitant principle that it is the state that "bears the heavy burden of demonstrating the 'high degree' of necessity required for a declaration of mistrial without the defendant's consent." (50 F.3d at 639, quoting Arizona v. Washington, 434 U.S. at

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23. Accord, Arizona v. Washington, 434 U.S. at 506, fn. 18: the power may be used only " 'with the greatest caution, under urgent circumstances, and for very plain and obvious causes ....'"

505-06.)[24]

In ascertaining whether the state had met its burden, the Ninth Circuit, following this Court's prescription, considered whether the trial court, in opting "'to abort the trial,'" kept in the forefront "'the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate.'" (50 F.3d at 638, fn. 3, quoting Arizona v. Washington, 434 U.S. at 511.) As discussed above, the circuit court correctly found that the trial judge in this case, rather than placing a high value on the defendant's own view whether continuing or aborting the first trial would be in the defendant's best interests, "acted abruptly by cutting off Adachi's objections and refusing to allow him to confer with Weston before he discharged the jury." (50 F.3d at 639.)[25] The state utterly ignores this aspect of the analysis.

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24. "[T]he strictest scrutiny is appropriate[, moreover,] ... when there is reason to believe that the prosecutor is using the superior resources of the State ... to achieve a tactical advantage over the accused." (Arizona v. Washington, supra, 434 U.S. at 508.) That was precisely the case here.

25. Cf. Braxton v. U.S., supra, 395 A.2d at 767 [retrial barred where trial court declared mistrial "in a manner and under circumstances" in "which ... the right of the defendant to retain that primary control" was not "fully recognized;" Lovinger v. Circuit Court, supra, 845 F.2d at 745 [retrial barred where court acted "precipitately" and without "great care, if not "irrationally or irresponsibly," in declaring mistrial after defense counsel began to protest]; and other cases cited in footnote 21 above.

The Ninth Circuit also found that the "state trial court did not properly consider alternatives to a mistrial" such as "the curative value of limiting instructions," which in this case "may well have eradicated any juror prejudice." (50 F.3d at 639.) The latter conclusion is also correct.

When discharging the jurors, the trial judge told them he did not think an admonition would have been effective. (RT 441.) The court never discussed the matter with counsel, however. The court's failure to permit any pre-discharge discussion regarding the adequacy of the cautionary instructions counsel had proposed indicated that the court was less than serious about looking for alternatives less drastic than a mistrial. (See, e.g., Arizona v. Washington, supra, 434 U.S. at 515-516 and fn. 34 [parties must be given "full opportunity to explain their positions on the propriety of the mistrial"].)[26]

Equally important, while the state feels comfortable attacking the Ninth Circuit on procedural grounds for not deferring to the trial judge, it must be pointed out that the state has never -- either in the certiorari petition or

26. Cf. U.S. v. Klein, 582 F.2d 186, 195 (2nd Cir.1978) [praising trial judge for asking counsel to suggest alternatives]; U.S. v. Sanders, 591 F.2d 1293, 1298 (9th Cir.1979) [double jeopardy precluded retrial where trial court declared a mistrial over the defendant's objection and, among other things, the record failed to show the trial court had considered "issuing a curative instruction"]; People v. Benton, 260 N.W.2d 77, 82, 84 (Mich.1977) [retrial barred: court declared mistrial without "any discussion with counsel of the efficacy of alternative curative measures" such as "a cautionary instruction"].)

in any prior pleading -- argued that the trial court was substantively correct in its (purported) conclusion that cautionary instructions would not be effective. The state cannot defend the trial court's substantive position because it is constantly (and rather successfully) engaged in convincing the California Supreme Court that such cautionary instructions are effective.[27] This Court has likewise found such instructions to be effective.[28]

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27. See, e.g., People v. Davis, 10 Cal.4th 463, 506 (1995) ["The admonition cured any potential harm"]; People v. Wash, 6 Cal.4th 215, 263 (1993) ["we presume that the jury heeded the admonition and any error was cured"]; People v. Frank, 51 Cal.3d 718, 727-728 (1990) [must assume jury heeded admonition to disregard prosecutor's assertions that capital defendant had previously molested two other children]; People v. Keenan, 46 Cal.3d 478, 525 (1988) [admonishing jury in robbery case to disregard evidence of prior robbery deemed effective"].

28. See Romano v. Oklahoma, ___ U.S. ___, 114 S.Ct. 2004, 2012 (1994) [Court presumes that, based on limiting instructions given to it, jury would give "little -- if any --" weight to information that the capital defendant had already been sentenced to death in another case]; Greer v. Miller, 483 U.S. 756, 766, fn. 8 (1987) [Court presumes jury will follow instruction to disregard prosecutor's insinuation that testifying defendant failed to give exculpatory version of events when arrested]; Richardson v. Marsh, 481 U.S. 200, 206 (1987) [Court presumes jury will heed instruction to disregard anything in co-defendant's confession that indirectly incriminates the defendant]; Watkins v. Sowders, 449 U.S. 341, 347 (1981) [Court presumes jury will heed instruction to disregard evidence of illegally obtained eyewitness identification evidence]; U.S. v. Hoelker, 765 F.2d 1422, 1426 (9th Cir.1985) [Court of Appeals presumes jury will follow instruction not to permit evidence that defendant committed crime X to influence its decision whether the defendant committed crime Y]. See also U.S. v. Sanchez, 722 F.2d 1501, 1508-1509 (11th Cir.1984) [court holds improperly admitted evidence of uncharged murders in cocaine case harmless in light of admonition that jury not to consider the evidence].

It is particularly possible in this case that instructions would have been effective, moreover, because: 1) check fraud and sexual assault are highly dissimilar crimes[29]; 2) defendant's proposed instructions called for the jury to be told (truthfully) that the check fraud allegation had been dismissed (CT 133; RT 428)[30]; 3) the jury was not told what offense Mr. Weston had been on parole for[31]; and 4) as discussed above, the prosecution's case against Mr. Weston was seriously flawed.

The Ninth Circuit's conclusion that limiting instructions "may well have" been effective here thus was not only uncontested by the state and consistent with the decisions of this Court and the California Supreme Court -- it was also perfectly reasonable. It was likewise perfectly reasonable for defense counsel to believe that, with the cautionary instructions, Mr. Weston had a decent chance of acquittal -- better, at least, than at a second trial in which the prosecution would beef up its case.

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29. See, e.g., People v. Fries, 24 Cal.3d 222, 230 (1979) ["risk of ... prejudice ... far greater when the prior conviction is similar ... to the crime charged"].

30. Cf. U.S. v. Burton, 525 F.2d 17, 20 (2nd Cir.1975) [reference in drug case to unrelated narcotics investigation involving defendant deemed cured by admonition similar to one proposed in this case -- investigation did not culminate in arrest, charges or conviction].

31. See People v. Harris, 22 Cal.App.4th 1575, 1581 (1994): evidence that defendant on parole at time of offense deemed harmless.

The Ninth Circuit also found that the "state trial judge ... did not properly consider whether the mistrial would benefit Weston." (50 F.3d at 639.) As shown above, "the first trial was going very well for [defendant] at the time the" mistrial was declared." (Ibid.) The prosecution, moreover, capitalized on the mistrial to double its witness list, steal two defense witnesses, and conduct further investigation. (See fn. 8 above.) The trial court showed no recognition whatsoever -- despite the written motion by the defense that made defendant's position clear -- that it might be in Mr. Weston's best interests to continue with the first trial despite the prosecution's attempt to bias the jury. The state ignores this aspect of the analysis as well.

Finally, in considering the state's claim that the Ninth Circuit has failed to accord sufficient deference to the state trial judge's decision, it is necessary to bear in mind the context in which the claim is made. This is the same trial judge, after all, who, among other things, contemptuously rejected defense counsel's objections to the rebuttal evidence; later blamed defense counsel for not objecting to the latter evidence; claimed there was no such thing as a dismissal with prejudice; claimed the rebuttal witness had "blurted out" the reference to Mr. Weston's arrest for check fraud; moved instantaneously from haranguing defense counsel to granting the mistrial; told defense counsel to "sit down and be quiet" when he attempted

to delay the discharge of the jury; twice called defense counsel a liar in front of the jury; indicated in front of the jury that he agreed with the prosecutor that defense counsel was dishonest; and, because of such conduct, was held by the district court to have rendered Mr. Weston's second trial unconstitutionally unfair (App. B, p. 81).[32] To put it bluntly, this was a trial judge whose rulings deserved not deference but strict scrutiny. If anything, the courts that have reviewed this case have been too reluctant to criticize the partiality and lack of decorum exhibited by the trial judge.

In sum, there was no manifest necessity for the mistrial here. In a case in which the defendant tried to prevent the admission of the prejudicial evidence, the evidence came in because of erroneous rulings by the trial court and intentional misconduct by the prosecutor, the defendant preferred to continue with the trial anyway because it was going so well and because a second trial could only benefit the prosecution, and limiting instructions were likely to mitigate the harm, there were no "extraordinary and striking circumstances" justifying the trial court's decision to end the trial prematurely (United States v. Jorn, 400 U.S. at 485). Instead of ignoring defendant's wishes, refusing to hear him out, refusing to

32. In earlier pleadings in this case, Mr. Weston catalogued another dozen prejudicial statements the judge made in the jury's presence, as well as many inappropriate rulings and comments that the jury did not hear. (See, e.g., Brief of Petitioner and Appellee, pp. 27-28.)

allow him to control his own destiny, and giving the prosecutor precisely the second chance he hoped for, the trial court should have allowed the first trial to play itself out as the defendant wished. The conclusion of the district court and Ninth Circuit that the trial judge's failure to do so violated the Double Jeopardy Clause is correct. It should not be disturbed.

CONCLUSION

For all of the foregoing reasons, the petition for certiorari should be denied.

Dated: August 7, 1995.

Respectfully submitted,

Bruce Eric Cohen
Attorney for Respondent
THEODORE ANTHONY WESTON

ORIGINAL

NO. 95-69

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

PEG KERNAN, WARDEN,

Petitioner,

v.

THEODORE ANTHONY WESTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DECLARATION OF SERVICE

I, Wendy E. Morrison, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1442-A Walnut Street, Berkeley, California 94709. Copies of the attached **BRIEF IN OPPOSITION AND REQUEST FOR LEAVE TO PROCEED IN FORMA PAUPERIS** were sent on August 10, 1995, by United States first-class mail, postage fully prepaid, to the following persons at the addresses given below:

DANIEL E. LUNGREN
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THEODORE ANTHONY WESTON
(Respondent)
2510 Fair Oaks Blvd.
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Sacramento, CA 95825

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 10th day of August, 1995, at Berkeley, California.

Wendy E. Morrison

Wendy E. Morrison

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August 10, 1995

William K. Suter
Clerk
Supreme Court of the United States
Washington, D.C. 20543-0001

Re: Kernan v. Weston, No 95-69

Dear Mr. Suter,

Enclosed please find the following: 1) an original and ten copies of Mr. Weston's Brief in Opposition; 2) a single, unattached copy of the cover page of the latter brief; 3) an original and one copy of Mr. Weston's Request for Leave to Proceed In Forma Pauperis; and 4) a proof of service regarding both the brief and the motion.

Please note that undersigned counsel's application for admission to the Bar of this Court was mailed under separate cover several days ago.

In the enclosed self-addressed envelope please file-stamp and return to me the loose cover page of the brief and the copy of the in forma pauperis motion.

Thank you.

Very truly yours,

Bruce Eric Cohen